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FOR THE THIRD CIRCUIT
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Clerk of District Court

Date 2-14-02

(District)

Gonzales vs. Varner, et al

(Caption)

Victor Gonzales

(Appellant)

00-CV-2061

(D.C. No.)

RECEIVED No. 01-2515
HARRISBURG, PA

FEB 20 2002

MARY E. D'AMOREA, CLERK

Per [Signature]

Enclosures:

2-14-02

Certified copy of C. of A. Order by the Court/Clerk

(Date)

* ✓ Record

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Appeals (Record)

DPS-46

November 30, 2001

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 01-2515

VICTOR GONZALES

VS.

BENJAMIN VARNER, ET AL.

(M.D. PA. CIV. NO. 00-CV-02061)

FILED
HARRISBURG, PA

FEB 20 2002

MARY E. D'ANDREA, CLERK
Per [Signature]
Deputy Clerk

Present: NYGAARD, ROTH and BARRY, CIRCUIT JUDGES

Submitted is appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1);

in the above-captioned case.

Respectfully,

Clerk

MMW/EAW/zm

ORDER

The Petitioner filed his habeas petition pursuant to 28 U.S.C. § 2241. Because a state prisoner's habeas corpus petition challenging a parole denial is properly brought pursuant to 28 U.S.C. § 2254, a certificate of appealability is necessary to allow the appeal from the denial of such petition to proceed. See Coady v. Vaughn, 251 F.3d 480, 485-86 (3d Cir. 2001); 28 U.S.C. § 2253(c). Treating Petitioner's petition as one brought pursuant to 28 U.S.C. § 2254, we deny his request for certificate of appealability.

To obtain a certificate of appealability, Petitioner must make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473 (2000). In his habeas petition, Petitioner contends, *inter alia*, that the parole board's decision to deny him release on parole on three separate occasions deprived him of due process because the parole board continued to rely on the nature of appellant's technical parole violation and on false or erroneous evidence of positive drug testing. We agree with the District Court's determination that Petitioner's claim is without merit. The claim fails because "federal courts are not authorized ... to second-guess parole boards

and the requirements of substantive due process are met if there is *some basis* for the challenged decision." Coady, 251 F.3d at 487 (emphasis added). There existed "some basis" for the parole board's denial insofar as it apparently rested on, *inter alia*, the board's determination that he needed to successfully complete a treatment program for substance abuse and decision making, the unfavorable recommendation from the Department of Corrections and, the absence of a clear conduct record. Additionally, Petitioner's allegations do not suggest that the parole board relied on constitutionally impermissible criteria or on considerations unrelated to the issues before it in denying release on parole. See id.; Block v. Potter, 631 F.2d 233, 236-37 and 241 (3d Cir. 1980).

Petitioner's second claim, that the board's original decision revoking parole ignored the DNA Clinical Laboratories Inc. scientific findings offered by the Petitioner as evidence at his hearing, also lacks merit. This claim does not rise to the level of a due process violation since it challenges the weight of the evidence, not its sufficiency. Jackson v. Virginia, 443 U.S. 307, 319 (1979). Due Process does not require "[s]crutiny of the reasoning process actually used by the factfinder." Id.

We decline to consider Petitioner's claim raised for the first time in his request for certificate of appealability, alleging failure to warn of the adverse effects of the ingestion of poppy seeds on drug test results. This claim was not presented to the District Court in the first instance and is not properly before this Court.

Accordingly, we conclude that Petitioner has failed to make a substantial showing of the denial of a constitutional right. See 28 U.S.C. §§ 2253(c)(2) and 2254(b)(2); Lambert v. Blackwell, 134 F.3d 506 (3d Cir. 1997).

By the Court,

Circuit Judge

Dated: FEB 14 2002

ch/cc: VG
RDS

A True Copy:

Marcia M. Waldron
Marcia M. Waldron,
Clerk